OFFICE OF PROFESSIONAL RESPONSIBILITY

INTERNAL REVENUE SERVICE
DEPARTMENT OF THE TREASURY
WASHINGTON, DC

June 7, 2006

DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY,	:	
Complainant	:	Complaint No. 2004-9
	:	
v.	:	
	:	
	:	
KEVIN FRANCIS	:	
Respondent	:	

DECISION

Appearances: Richard M. Slizeski, Esq., Senior Counsel, Office of Chief Counsel, General Legal Services, Internal Revenue Service, San Francisco, California, for Complainant;
Steven R. Mather, Esq., Kajan Mather and Barish, Beverly Hills, California, for Respondent.

Before: Judge Hodgdon

This disciplinary proceeding was initiated against Kevin Francis, an enrolled agent authorized to practice before the Internal Revenue Service (IRS), pursuant to 31 C.F.F Part 10, Subpart D, issued under the authority of 31 U.S.C. § 330 (2003).[1] The United States Department of the Treasury, Director of the Office or Professional Responsibility, alleges 34 violations of the Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, and Appraisers before the Internal Revenue Service, 31 C.F.R. § 10.20 (1994) *et seq*., by the Respondent and requests that he be suspended from further practice before the Internal Revenue Service for two and one-half years. Or the reasons set forth below, I affirm the violations and order that the Respondent be suspended from practice before the IRS for two and one-half years.

[1] The regulations governing practice before the Internal Revenue Service were revised, effective July 26, 2002. This proceeding is governed by the procedures specified in the revised legality of conduct engaged in prior to July 26, 2002, will be determined under the 1994 regulations in effect

Background

The Respondent's family took over Basic Business Services, Inc. (BBS), an accounting practice, in 1982. The Respondent began working there while he was in high school. In 1987, he received a B.A. in Management from State University, Area 1, State 1. In 1993, he received a Masters degree in Finance. Francis became an Enrolled Agent authorized to practice before the IRS in 1995 and, as such, has represented clients before the IRS since that time.[2]

In a letter dated July 11, 2002, the Respondent was informed by the Office of the Director of Practice that his eligibility to practice before the IRS was being questions because of alleged violations of the regulations governing practice before the IRS. Francis responded to the allegations through his counsel on January 16, 2003. The Office of Professional Responsibility's (OPR), as the Office of Director of Practice became known after July 26, 2002, in a May 20, 2003, response to Francis' January 16 submission, removed some of the allegations, retained some and added some new ones. By counsel, Francis submitted a written response to OPR's May 20 letter on June 18, 2003.

On December 10, 2003, OPR advised Francis that it was preparing a complaint to initiate disciplinary proceedings against him to suspend him from practice for two and one-half years. Francis responded to the notice, through his counsel, on January 12, 2004.

The Complaint was filed on July 7, 2004. the Respondent filed his Answer on August 6, 2004. A trial was held in State 1, on May 16-19, and October 4-6, 2005. The parties submitted post-hearing proposed findings of facts and conclusions of law, and reply briefs.

Motions

On February 1, 2006, the Respondent moved to strike the Complainant's Proposed Findings of Fact and Conclusions of Law, alleging that it exceeded the 50 page limit on briefs. The Respondent based this allegation on the fact that the footnotes in the document were single-spaced and in a smaller font than the body of the document. The Complainant opposed the motion. I find this motion to be without merit and **DENY** it.

On February 27, 2006, the Respondent moved to supplement the record with 23 documents it asserted it had just received in response to a Freedom of Information Act (FOIA) request. The Complainant opposed the motion.

The motion was filed after proposed findings had been filed and one day before the reply briefs were due to be filed. The record in the case was closed when the hearing

[2] Section 10.2(d), 31 C.F.R. § 10.2(d), defines "practice before the IRS" as comprehending

> All matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing and filing documents, corresponding and communicating with the Internal Revenue Service, and representing a client at conference, hearings and meetings.

closed on October 6, 2006. (Tr. 1510.) The Respondent made no request to keep the record open at the hearing or at any time prior to filing his motion. The motion does not state when the FOIA request was made. Accordingly, I find that good cause for the motion has not been shown and **DENY** the motion.

Findings of Fact and Conclusions of Law

OPR alleges that Francis violated section 10.20(a), 31 C.F.R. §10.20(a) (1994), which prohibits neglecting or refusing to promptly submit records or information in any matter before the IRS on proper and lawful request; sections 10.22(a) and (b), 31 C.F.R. §§ 10.22 (a) and (b) (1994), requiring the exercise of due diligence in preparing and filing returns, documents and other papers relating to IRS matters and in determining the corrections of oral or written representations made to the Treasury Department; section 10.23, 31 C.F.R. §10.23 (1994), proscribing unreasonably delaying the prompt disposition of matters before the IRS; and sections 10.51(b), (f) and (i), 31 C.F.R. §§ 10.51(b), (f) and (i) (1994), prohibiting disreputable conduct by knowingly giving false or misleading information to the IRS, attempting to influence official IRS action by making false accusations or engaging in contemptuous conduct in practice before the IRS. The Respondent contends that this case was initiated in bad faith, was investigated in a haphazard manner, and that the record does not support any violations.

The Respondent has raised some general procedural objections. He asserts that OPR's rationale behind its allegations of unreasonable delay in responding to information requests have changed over time. (Resp. Br. At 16-71.) In addition, the Respondent argues that various allegations in the Complaint are "suspect" because no prompt referral was made and because of the way the referral was made. (Resp. Br. At 16-71.) These arguments were previously raised in a motion to dismiss which was denied on November 22, 2004, a motion for summary judgment which was denied on May 16, 2005, (Tr. 5-6), and a motion for directed verdict which was denied on October 4, 2005 (Tr. 861). No evidence was introduced at the hearing which would necessitate further discussion of the issues.

The Respondent also maintains that OPR has to show that he willfully violated the regulations he is alleged to have transgressed and that "willfully" should be defined as it is in federal tax law. (Resp. Br. At 16.) "Willfully" is defined in federal tax law as, "a voluntary, intentional violation of a known legal duty." *U.S v. Pomponio*, 429 U.S. 10, 12 (1976). On the other hand, OPR suggests that it should be defined as it is in other professional disciplinary proceedings as "a general purpose or willingness to commit the act or permit the omission." Edwards v. State Bar, 52 Cal.3d 28, 37 (1990) (quoting Durbin v. Sate Bar, 23 Cal.3d 461, 467 (1979)). (Comp. Br. At 4.) While not all sections require willfulness, I find that for those that do, OPR's definition should apply. However, in this case it makes little difference, since I find that the Respondent's conduct comes within the federal tax law definition in that he knew or should have known of the requirements of the regulations governing practice and acted voluntarily in violating them.

The charged violations occurred in connection with Francis' representation of five taxpayers before the IRS. Contrary to the Respondent's assertions, I find that the allegations are supported by clear and convincing evidence in the record. The violations will be discussed by taxpayer case.

Corp. 1

The Complaint alleges four violations each of sections 10.20 (a)[3] and 10.23[4] in connection with the Respondent's representation of Corp. 1. (Comp. paras. 6-25.) The violations occurred because Francis did not respond to Date 27 and Date 3, information requests from Revenue Officer "A" and did not respond to Date 5, and Date 28 and Date 7, information requests from Revenue Officer "B" or a Date 9, information request from Area 1 Territory Manager "C".

The Date 27 and Date 3, requests

"A" testified that he was responsible for the Corp. 1 case from around Date 29 through early Date 30. (TR. 549.) He sent the Respondent a letter on Date 1, requesting information about Corp. 1 as part of his investigation into the corporation's ability to pay "941 taxes" that it had not paid on time, as well as the liability of the corporate officers for a trust fund recovery penalty if the corporation could not pay the back taxes.[5] (Jt. Ex. 47, Jt. Ex. 48 at 2, Tr. 563-64, 625-26.) The letter requested the following information be furnished by Date 2: (1) "Copies of all corporate bank signature cards for all corporate accounts that were in effect from Date 31, to the present;" (2) "Copies of three checks (front and back) from all corporate checking accounts for each month from Date 31, to Date 32;" (3) "Copies of all corporate bank statements from Date 31, to Date 32;" (4) "Form 940, Employer's Annual Federal Tax Return: Date 111; Date 16;" (5) "Form 1120, U.S. Corporate Tax Return: Date 33; Date 34; Date 35;" (6) "Articles of Incorporation;" (7) "Corporate bylaws;" (8) "Corporate minutes from Date 30 to the present;" (9) "Statement by domestic stock corporation;" (10) "Form 433-B: Collection Information Statement for Business;" (11) "A copy of the rental agreement with the name, address, and phone number of the landlord;" and (12) "A current Form 2848 designating you as the power of attorney for Corp. 1 " (Jt. Ex. 47.)

"A" met with Francis on Date 36, at Corp. 1 to view the premises and to pick-up the requested information (Tr. 566,627.) Later, in his office, "A" realized, when he went through the documents, that Francis had not provided all of the information requested. (TR. 566.) Of the twelve items requested, the Respondent had only given him three: (4), (10) and some of (5.) (Tr. 565-67, 629.)

Consequently, "A" sent Francis a follow-up request for information on Date 3, listing the items he had not received in response to the prior request and adding some new items. (Tr. 566-67.) He again requested a Form 2848, the articles of incorporation, the corporate bylaws, the statement by domestic stock corporation, complete copies of Forms 1120 for Date 37, Date 38, and Date 39, copies of three checks from each corporate

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[3] Section 10.20(a) (1994) provides, in pertinent part, that: "No…enrolled agent…shall neglect or refuse promptly to submit records or information in any matter before the Internal Revenue Service…"

[4] Section 10.23 (1994) states that: "No…enrolled agent…shall unreasonably delay the prompt disposition of any matter before the Internal Revenue Service."

[5] "941 taxes" are the federal income taxes withheld by the corporation from its employees, along with the employees' and corporation's share of Social Security and Medicare taxes, which the corporation must pay to the IRS monthly, or quarterly, depending on its size (Tr. 549.)

checking account and copies of all corporate bank statements. (Jt. Ex. 49.) The new items requested were completed Forms 4180 for Shareholder(s) 1 and Shareholder(s) 2 (corporate officers) and completed Forms 433-A for Shareholder(s) 2 and Shareholder(s) 1. (Jt. Ex. 49.) All of the information was requested to be furnished by Date 4. (Jt. Ex 49.)

In response to two voice mail messages from Francis, "A" called him on Date 40. (Tr. 569.) In answer to Francis' query, "A" told him that the information he had requested was not in the file that he had not received it from Francis in response to the Date 27 request, and that was why he had sent the Date 36 request. (Jt. Ex. 50 at 3-4, tr. 569-70.) Francis then told "A" that he would submit the information by Date 41, or by early the next week. (Jt. Ex. 50 at 4, Tr. 570.) However, Francis called "A" on Date 41 and told him that some of the requested documentation was in storage, so "A" granted him an extension of time to respond until Date 62. (Jt. Ex. 50 at 4, tr. 570.) Nonetheless, Francis did not furnish the information by that date. (Jt. Ex. 50 at 6, Tr. 570.)

As a result of not receiving the requested information, "A" was not able to make a determination whether Corp. 1 was financially able to pay the 941 tax liability, whether the company should be put on an installment plan, or whether some other type of resolution was required. (tr. 572-73.) He was also unable to resolve who should be responsible for the trust fund recovery penalty. (Tr. 573.)

Francis' explanations concerning his failure to furnish this information were inconsistent and contradictory. In his January 16, 2003, initial response to the allegations, Francis, through his attorney, claimed that "any failure to provide information properly requested by the Revenue Officer is due entirely to failures on the taxpayer's behalf." (Resp. Ex. Z at 4.) But, in his January 12, 2004, response to the notice of possible institution of disciplinary proceedings, Francis, through counsel, stated with regard to providing the information requested in the Date 27 letter, that "[t]he principal missing items were the corporate minutes, which the taxpayer did not possess, and bank statements and cancelled checks for a portion of the period requested." (Resp. Ex. F at 7.)

Concerning the Date 36 request, he ambiguously stated: "The Revenue Officer again requested corporate minute books which were unavailable, along with certain additional documents. The remaining items were provided." (Resp. Ex. F at 7.) However, in his Answer the Respondent asserted that he had provided the cancelled checks and bank statements, while admitting that he did not provide the bank signature cards, articles of incorporation, corporate by-laws, corporate minutes and statement by domestic stock corporation.[6] (Answer at paras. 9a and b, 14a.)

When he testified at the hearing, Francis said that he met with Shareholder(s) 1 and Accountant "A", Corp. 1 accountant, before "A" arrived on Date 36 "and went through every item on this and put it in an envelope that I handed to him in their presence" (Tr. 1176.) This implies that he furnished everything requested. Indeed, Francis subsequently testified that when he received the Date 36 letter, "I was quite surprised. As far as I knew, we provided everything he'd asked for." (Tr. 1180.) The

[6] Rule 10.64(c), 31 C.F.R. § 10.64(c), provides that: "Every allegation in the complaint that is not denied in the answer is deemed admitted and will be considered proved; no further evidence in respect of such allegation need be adduced at hearing."

Respondent further claimed that when he gave "A" the documents on Date 36, he "told him specifically what wasn't available. I don't recall now, but we went through what he requested and the documents, so if it wasn't there, I said, 'Well, this is why it wasn't there.'" (Tr. 1186.) Finally, he maintained that he enclosed a cover letter with his response to the Date 36 request stating what he was providing, although he did not have a copy of the letter at the hearing. (Tr. 1185-86.)

In sum, Francis has averred at various times that he provided all of the documents, that he did not provided all of the documents, that he told "A" what was and was not being provided, and that if he did not provide all of the documents it was not his fault, but the taxpayer's. He made one other insinuation to explain why "A" did not have the documents and that was that ""A" has a history of misfiling or losing documents." (Resp. Br. At 4.) This claim is apparently based on the fact that a letter sent to Francis by "A" on Date 42, (Jt. Ex. 46), initially could not be found by the IRS and was later discovered in the Shareholder(s) 1 trust fund recovery penalty file instead of the Corp. 1 file. (Tr. 623, 1172-73.) Francis also testified that in a taxpayer case unrelated to this proceeding "A" called him, told him he had lost some documents and asked him to send them again. (Tr. 1188.) I do not consider one document misfiled in a related case file and one call requesting the re-submission of documents as evidence of a history of misfiling and losing documents, nor any explanation of why "A" did not have the documents he requested from Francis.

On the other hand, I find Francis' inconsistent, contradictory and unsupported claims not credible. Accordingly, I conclude that Francis did not provide the information sought in the Date 27 and Date 36 requests as alleged in the Complaint.

The Date 5, and Dates 28, 6 and 9 Requests

Because of perceived problems dealing with Revenue Officer "A", the Respondent requested that the Corp. 1 case be reassigned to another revenue officer. The case was reassigned to Revenue Officer "B" in Date 30. On Date 5, she called Francis and advised him that she needed Forms 433-A, Financial Information Statement, for each corporate officer and a Form 433-B for the corporation, so she could review the corporation's and corporate officers' ability to pay the trust fund assessment. (Jt. Ex. 51 at 4-5, Tr. 687.) Francis did not provide the forms or offer to provide the underlying records so that "B" could complete the forms, nor did he advise her that he could not provide the forms. (Tr. 687-88.)

As a result, "B" called Francis on Date 43, and told him that she needed proof of the current federal tax deposits and "still needed the form 433-A and form 433-B along with the income and expense verification." (Tr. 689.) She told him that the information should be submitted by Date 44. (Tr. 690.) On Date 28, "B" called Francis again to tell him that she had not received the proof of tax deposits that he said he had "faxed" to her. (Jt. Ex. 52 at 4.) During the conversation, Francis told her that Date 44 was not enough time to furnish the information that she had requested, so she extended the deadline until Date 8 and also acceded to his request that she use form 433-B already in the file if he would submit verification of the income and expenses. (Jt. Ex. At 4-5, Tr. 691.)

After the meeting with her Group Manager, "F", on Date 7, "B" "faxed" Francis a list of the requested items. (Jt. Ex. 53, Tr. 694.) Later that day, "B" and "F" called Francis to see if he had received the fax and went over the list with him. (Jt. Ex. 54 at 1, Tr. 694.) Francis said that he would provide the information. (Jt. Ex. 54 at 1, Tr. 694, 767.) Despite agreeing to provide the information as requested, the Respondent did not provide it by Date 8, nor did he request an extension of time or explain why it was not being furnished. (Tr. 695-96, 767.)

When the information was not received on Date 8, another letter was sent to Francis on Date 9, over the signature block of "C", Area 1 Territory Manager, on the theory that a letter from her would carry more weight.[7] (Jt. Ex. 55, Tr. 698.) The letter noted that:

> A review of this case revealed that several request[s] for necessary Information, regarding your clients, have either not been provided, partially provided, and/or untimely if provided. The most recent request[s] made of you were on Date 45 and Date 7. The requested information was due on Date 8 and has gone un-provided.

(Jt. Ex. 55.)

The letter went on to list the specific items requested: (1) "Current copy of all outstanding Account Receivables Listing from Date 46 through Date 6;" (2) "Explanation of note/loan payment for $ Amount 1, reflected on 433-B, line 25 along with a copy of the contract and proof of payments for Date Range 1;" (3) "Receipts and cancelled checks for materials purchased for $ Amount 2, or more for Date 47;" (4) "Lease Agreement and cancelled checks for Date Range 1;" (5) "Explanation for repairs/maintenance reflected on 443B, line 41. Provide invoices & canceled checks;" (6) "Invoices and cancelled checks for other expenses reflected on 433B, line 44;" (7) "Bank statements for Date Range 2;" (8) "An answer as to whether an employee is still residing on the business premises;" (9) "An updated form 433A for both Corporate Officers and their spouses for Date 48 through Date 6 along with the three most recent pay stubs;" and (11) "The Filing of the 1120 tax return for Date 49." (Jt. Exs. 55 and 56.)

The letter concluded: "The above noted information must be presented to the assigned Revenue Officer, by you, no later than Date 10." (Jt. Ex. 55.) At best, Francis provided a minimal amount of the information. (Tr. 698-99.)

With regard to item (1), he provided aged accounts receivables rather than current accounts receivables. (Tr. 701.) No information was offered concerning item (2). (Tr. 701.) For item (3), the Respondent submitted documents totaling $ Amount 3 to substantiate expenditures of $ Amount 4 for materials purchased. (IRS Ex. 13, Tr. 702.) He only submitted cancelled checks supporting one and one-half months rent in response to item (4.) (Tr. 703.) The 433-B claimed expenses of $ Amount 5 for repairs and maintenance, but Francis only provided documentation to support expenses of $ Amount 6 and did not provide invoices and cancelled checks for item (5.) (IRS Ex. 13, Tr. Ex. 56, Tr. 703.) No invoices and cancelled checks for other expenses were provided for item (6). (Jt. Ex. 56.) Francis did provide bank statement for Date Range 2 for item (7); however, they indicated deposits and credits of $ Amount 7 while the gross receipts shown on the 433-B were $ Amount 8. (IRS Ex. 13, Jt. Ex. 56, Tr. 703-04.) The information was provided for item (8.) (Tr. 704.) Incomplete Forms 443-A were submitted in response to item (9.) (Tr. 704.) Bank statements were not submitted for two

[7] The letter was actually signed by "F" for "C".

bank accounts listed on the 433-B for item (10), although bank statements were submitted for banks not listed. (IRS Ex. 13, Jt. Ex. 56, Tr. 704.) Finally, the requested 1120 tax return was submitted for item (11). (Tr. 704.)

At the hearing, Francis did not deny not providing any information to "B" in response to her Date 5 telephone call. Instead, he attempted to blame her for the delay, stating; "There were some discussions that we had in which she said what information she wanted, and it was very unclear as to what she wanted. And there were different things that she said, she wanted that I asked her why she needed them, and she wouldn't clarify that though." (Tr. 1191.) In fact, it was clear that she wanted Form 433-A and 433-B, but Francis did not think he should have to provide them.

After she put the request in writing on Date 7, his excuse changed. He asserted that "this specific request was supposed to be for a meeting that was going to occur in my office on Date 50." (Tr. 1192.) He claimed that the meeting was cancelled, so there was no deadline for responding. (Tr. 1995, 1999.) This explanation does not make sense. The Date 7 fax makes no mention of a Date 50 meeting. (Jt. Ex. 53.) When Francis called "B" about the fax, he did not mention a meeting but said that Date 44 was not enough time to get the information. (Jt. Ex. 54.) He did, however, state that he would provide the information by the new deadline of Date 8. (Jt. Ex. 54.) Further, the Date 9 letter also makes no mention of a meeting, but does state that the Date 8 deadline was missed. (Jt. Ex. 55.)

With regard to the Date 9 request, Francis again blamed the taxpayer, claiming that he provided everything that the taxpayer gave him. (Tr. 1202.) Significantly, he did not bother to inform the IRS that the information he was providing was all he could get from the taxpayer or to provide any other explanations for his failure to make a complete response.[8] (Tr. 1379.) In addition, the Respondent signed, certifying that to the best of his knowledge and belief the information was true, correct and complete the 433-B that he insisted the IRS use. (IRS Ex. 13.) Yet he failed to provide almost any supporting documentation to support the figured that he had included on the form.

For instance, the $ Amount 9 monthly note/loan payment, item (2), was listed as a payment on a loan balance of $ Amount 10. Francis did not provide any information or explanation to the IRS concerning this item in response to the Date 9 request. He claimed at the hearing that "three or four of the items were just credit card bills, so there's no note agreement" and that "one of the major notes was a note from, like, a very old note, which I did not have a copy of. And it was with a personal friend of theirs." (Tr. 1211.) This is directly contrary to the balance sheet attached to the 433-B which, under the heading "Long Term Liabilities," lists two loans and three notes ranging in amount from $ Amount 11 to $ Amount 12 and totaling $ Amount 10. (IRS Ex. 13 at 10.)

Similarly, item (3) sought receipts and checks to substantiate materials purchased in the amount of $ Amount 13. Because Francis claimed that the number of checks and receipts would be too voluminous, the IRS, based on his assurance that checks and receipts of $ Amount 2 or more would provide a good representation of the expenses, agreed to limit the submission to amounts of $ Amount 2 or more. (Tr. 702, 738, 1479.)

[8] It would not have taken much for Francis to advise "B" that he was unable to obtain the information. Common sense and common courtesy would suggest no less; professional representation of clients before the IRS would also require no less.

Despite this concession, the Respondent was unable to submit one check or receipt for $ Amount 2 or more and only submitted documentation for $ Amount 14 of the expenditures. He asserted at the hearing that there were no expenses above the limit. (Tr. 1214.) While that is somewhat hard to accept, if true, then his suggestion as to where the limit should be set was completely disingenuous.[9]

Next, Francis claimed that the $ Amount 2 limit also applied to items (5) and (6). (Tr. 1217.) In fact, the $ Amount 2 is only mentioned in the letter in connection with item (3). (Jt. Ex. 55.) Furthermore, since the total repairs and maintenance expenses sought in item (5) were only $ Amount 5, it is hard to believe that there would be many checks or receipts, let alone that a $ Amount 2 limit needed to be placed on them. Concerning item (6), Francis avowed that: "There was nothing close in the other expense category. There wasn't anything to provide, nothing close." (Tr. 1217.) While this "misunderstanding" provides a convenient excuse for failing to provide *any* documentation for $ Amount 15 in other expenses, it defies credulity that Francis would think it was alright to submit nothing in response to the request or provide any explanation to the IRS, not even his alleged misunderstanding.

Again, I find Francis' testimony to be inconsistent, contradictory and incredible, while the IRS employees' testimony was very credible. Therefore, I conclude that he failed to provide the information requested on Date 5, Dates 28 and 6, and Date 9, as charged.

In all of these instances, Francis engaged in a course of conduct which unreasonable delayed the prompt resolution of the Corp. 1 case. He clearly neglected, and in all likelihood refused, to promptly submit information properly and lawfully requested by Revenue Officers "A" and "B". Accordingly, I conclude that he violated sections 10.20(a) and 10.23 as alleged.

Shareholder(s) 1

The Complaint charges three violations each of sections 10.51(f) and 10.51(i) in connection with the Respondent's representation of Shareholder(s) 1.[10] (Comp. paras 26-38.) The violations occurred on Date 52, when Francis told Revenue Officer Group Manager "J" that he had not been informed of the filing of tax lien on the residence of the Shareholder(s) 1s; on Date 52, when Francis sent a letter to Revenue Officer "A" stating that "A" and Lien Advisor "H" had agreed to a lien subordination; and later in Month 1, when Francis told various IRS employees that "A" and "H" had agreed to a lien subordination.

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[9] I find Francis' assertion that the limit was suggested by "G", the IRS Area Director, to be incredible. (Tr. 1214.) According to "B" and "F", "G" was not involved in the discussion. Nor does it make sense that "G" would have suggested a limit without Francis' input since Francis was the one supposedly familiar with the figures, not "G".

[10] Sections 10.51(f) and 10.51(i) (1994) state, in pertinent part, that an enrolled agent may be disbarred or suspended from practice before the IRS for disreputable conduct, including, but not limited to: "(f) Directly or indirectly attempting to influence…the official action of any officer or employee of the Internal Revenue Service by the use of threats, false accusations, duress or coercion;" or "(i) Contemptuous conduct in connection with practice before the Internal Revenue Service, including making false accusations and statements knowing them to be false, or circulating or publishing malicious or libelous matter."

The Date 52 Conversation

Shareholder(s) 1 was a corporate officer of Corp. 1. When the Corp. 1 case was assigned to Revenue Officer "A", he was also assigned the trust fund recovery penalty case against Shareholder(s) 1. (Tr. 551.) On Date 64, Francis left "A" a voice mail stating that he was responding to correspondence "A" had sent Shareholder(s) 1 and asking "A" to call him. (Jt. Ex. 35 at 1.) "A" returned the call that same day. He told Francis that a trust fund recovery penalty had been assessed against Shareholder(s) 1, that he would be immediately filing a notice of federal tax lien against Shareholder(s) 1's house, and that the lien would adversely affect Shareholder(s) 1's credit rating. (Jt. Ex. 35 at 1, Tr. 552.) Francis replied; "You can go ahead and file it." (Jt. Ex. 35 at 1, Tr. 552.) So, "A" did. (Tr. 553.)

On Date 64, Francis called "J", "A"'s manager, to request that the lien be released so Shareholder(s) 1 could refinance his house. (Tr. 252.) When "J" advised Francis that there was no justifiable reason for releasing the lien, Francis became angry and requested the names of "J"'s territory manager and area director. (Jt. Ex. 35 at 2, Tr. 252-53.) Later that day, "J"'s acting territory manager, saying that he had received a call from the area director's office asked if "J" would see if there was anything that could be done about the lien. (Tr. 254.)

"J" called Francis back on Date 52 and told him that the taxpayer could make a request for a lien subordination. (Tr. 255.) Francis said that he was aware of that, but that would cost the taxpayer more money. (Tr. 255.) Then, Francis claimed that he had not been given notice of the trust fund recovery penalty assessment (Jt. Ex. 35 at 2, Tr. 255.) Next, he asserted that he had not been advised by "A" that the notice of federal tax lien would be filed. (Jt. Ex. 52, Tr. 255.) When "J" pointed out to him that the Date 64 case history showed that "A" told him in a telephone call that the lien would be filed, Francis maintained that the conversation had never taken place.[11] (Jt. Ex. 25 at 2, Tr. 255-56.) When "J" advised him that would be a collection due process (CDP) appeal issue, the Respondent acknowledged the conversation with "A" but still averred that he was never informed that a notice of federal tax lien would be filed. (Jt. Ex. 25 at 2, Tr. 256.) Francis then became quite angry, jumping from one issue to another and concluded the conversation by saying that he would do whatever he had to do. (Jt. Ex. 25 at, Tr. 256.)

At the hearing, Francis claimed that he told "J" that he did not know that the lien *had been* filed, not that he was not advised that a lien *would be* filed. (Tr. 1241-42.) I do not believe him. "J" recorded the conversation the day it happened. (Jt. Ex. 35 at 2.) At that time there was no case pending against the Respondent and no reason for "J" to not accurately record the conversation. The entry twice says that Francis said that he was never advised that a lien *would be* filed. (Jt. Ex. 35 at 2.)

On the other hand, the Respondent, who has ample reason for not telling the truth, made no contemporaneous notes of the conversation. (Tr. 1394.) Furthermore, Francis conceded that he called "J" to try to get him to rescind the lien. (Tr. 1394.)

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[11] The case history refers to the integrated collection system (ICS) history, a computer system on which revenue officers and other IRS officials record information and actions taken on a case. (Tr. 79-80.) The information is usually recorded on the same day it occurs; it can be changed or corrected on the same day it is recorded, but it cannot be changed thereafter. (Tr. 412.)

When he was informed in his first conversation with "J" that the lien would not be rescinded, he became agitated and apparently called the area director's office. When "J" called him back and told him that there was no basis for lifting the lien, that the only option was a lien subordination, Francis again became angry and made several false statements, among them that he was not aware of the trust fund recovery penalty assessment, that he was not advised that the lien would be filed and that he had not had a conversation with Revenue Officer "A" on Date 64.

He made these claims only after he had been told that the lien would not be rescinded, he had gone over "J"'s head, and he had again been told that the lien would not be rescinded. The only conclusion that can be drawn from this is that he made the false statements, particularly that he had not been advised that the lien would be filed, in an attempt to get "J" to rescind the lien.

Consequently, I conclude that Francis knowingly made false accusations and statements in an attempt to influence Revenue Officer Group Manager "J" to cancel the lien on the Shareholder(s) 1's residence. Thus, he violated sections 10.51(f) and (i) as alleged.

The Date 52 letter

In spite of the foregoing, the Shareholder(s) 1s subsequently submitted a request to have the lien subordinated.[12] (Jt. Ex. 38.) The Date 4, request stated that Shareholder(s) 1 wanted to refinance his house to get a lower interest rate and to use the money obtained to pay off a high interest business loan. (Jt. Ex. 38.) On Date 67, "I", a Lien Advisor in the Area 2 office, informed the Respondent that the request was being denied. (Jt. Ex. 45 at 3, Tr. 414.) On Date 68, "I" sent out the denial letter to the escrow company handling the loan, denying subordination as not in the best interest of the government. (Jt. Ex. 41, Tr. 414.)

After the denial had gone out, Francis called "I" on Date 66, but got her supervisor "L", Group Manager of the Advisory Unit technical Service, because "I" was on leave. (Jt. Ex. 45 at 9, Tr. 489.) He requested that the subordination request be reconsidered, stating that the taxpayer would agree to have $ Amount 17 or the $ Amount 16 loan go to the IRS and to enter into an installment agreement to pay off the past-due payroll taxes. (Tr. 490.) "L" told Francis that in view of the new proposal she would have "H", another Lien Advisor, to take a look at it in "I"'s absence. (Tr. 449, 451, 490.)

"H" called Francis on Date 52. During the conversation, "H" found out that Francis actually meant an offer in compromise with installment payments, rather than an installment agreement to pay off the past taxes.[13] (Jt. Ex. 45 at 9, Tr. 453.) "H" said that the installment agreement had been the main reason "L" had agreed to reconsider and that, as a result, he wanted to confer with Revenue Officer "A" and would call Francis on Date 57 with a decision on the reconsideration. (Jt. Ex. 45 at 9, Tr. 453.)

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[12] In a request for lien subordination, the taxpayer requests that the IRS allow another creditor's lien, usually a lender, to take a superior position to the IRS' lien. It will only be approved if the subordination is in the interest of the government as well as the taxpayer. (Tr. 488.)

[13] In an offer in compromise the taxpayer offers to pay less than he owes in full satisfaction of the tax liability. (Tr. 80.)

Apparently unaware of the discussions that had gone on between Francis and "L" and "H", Revenue Officer "A", who was handling the collection case against Corp. 1 (discussed above), returned a telephone call to Francis on Date 52. (Jt. Ex. 45 at 5, Tr. 574.) Francis told him that the Shareholder(s) 1s' request for lien subordination had been turned down by "I" and that the decision had been upheld by her supervisor. (Jt. Ex. 45 at 5-7. Tr. 574.) Francis then said that the taxpayer was willing to pay the IRS $ Amount 17 and asked if "A" would give his opinion to "I". (Jt. Ex. 45 at 7.) When "A" replied that he stood by "I"'s decision Francis said, "You mean you don't care?" (Jt. Ex. 45 at 7, Tr. 574.) "A" replied that the lien advisors had the expertise in the area. (Jt. Ex. 45 at 7.)

Later that same day. "A" returned "H"'s call. (Jt. Ex. At 7, Tr. 574.) "H" told him about his discussion with Francis and that Francis had said he was going to request a collection appeals hearing (CAP) on the denial of the lien subordination. (Jt. Ex. 45 at 7, Tr. 575.) They further discussed that before he could request a CAP hearing, Francis has to have a conference with "A"'s supervisor, "F". (Jt. Ex. 45 at 7, Tr. 575-76.) "H" said that he would send "A" "I"'s paper case file so he could go over it with "F". (Jt. Ex. 45 at 7, Tr. 575.) "H" also asked "A" to make a recommendation on the new subordination request by the next day in preparation for his return telephone call to Francis. (Jt. Ex. 45 at 9.)

Late in the day on Date 69, Francis "faxed" his collection appeal request to "A" in which he stated that if a lien subordination were approved, the taxpayer would be willing to have a $ Amount 17 of the $ Amount 16 go to the trust fund portion of Corp. 1's tax liability, if the remaining $ Amount 18 could go to the company. (Jt. Ex. 45 at 9-10. Tr. 576.) However, when "A" reviewed "I"'s subordination request file on Date 57, he concluded that if the new request were accepted, the $ Amount 17 should go to the *non*-trust fund portion of the 941 tax liability to protect public interest. (Jt. Ex. 34 at 11.) "A" then called "H" and told him his conclusions. (Jt. Ex. 45 at 11.)

"A" next called Francis and told him that *if* the IRS approved the subordination of the loan, the $ Amount 17 had to be applied to the non-trust fund portion of Corp. 1's tax liability. (Jt. Ex. 45 at 12, Tr. 577.) Francis responded that the proposal sounded like "blackmail," that it would be more equitable to apply the amount to the trust fund portion. (Jt. Ex. 45 at 13, Tr. 577-78.) After they argued their positions awhile, "A" told Francis to submit the proposal in writing since it was different than the written subordination request currently before them. (Jt. Ex. 45 at 13.) "A" ended the conversation by stating that the taxpayer could apply for a CAP hearing if a meeting with "F" was not successful; otherwise "I"'s initial ruling would stand. (Jt. EX. 45 at 13, Tr. 578.)

"A" called Francis again, later in the day, and Francis said that in view of "A"'s position on the $ Amount 17, he wanted the money to go toward the taxpayer's personal trust fund recovery penalty assessment. (Jt. Ex. 45 at 14-15, Tr. 579.) "A" told him to put the request in writing, and the Respondent said he would "fax" it to him. (Jt. Ex. 45 at 15, Tr. 579.)

"A" next received a telephone call from "H" who told him that he had just talked to Francis. "A" told "H" about the Respondent's change to request that the $ Amount 17 go to the taxpayer's personal liability. They discussed the proposal and decided that "A" would get Francis to submit the request in writing and would seek an opinion from IRS

Counsel over where the money should be applied. (Jt. Ex. At 15, Tr. 580.) As a result, "A" called Francis and asked him a second time to submit the request in writing. (Jt. Ex. 45 at 16, Tr. 580-81.) He also told Francis that he was going to seek a legal opinion on where the funds should go and asked him if he wanted to contact the Taxpayer Advocate Office about the matter. (Jt. Ex. 45 at 7, Tr. 581.)

In apparent response to "A"'s request, and despite the fact that clearly no agreement had been reached, Francis "faxed" "A" a letter dated Date 51, which stated that: ""H" and yourself agreed to subordinate on the grounds that of the $ Amount 16 of equity that is being taken out, $ Amount 17 must be paid to the IRS."[14] (Jt. Ex. 45 at 17, Tr. 582.) The letter opposed delaying matters by referring the issue to the Chief Counsel and also stated: "I feel as if you ar[e] holding the threat of refusing the subordination as an attempt to extort money from a taxpayer" and "[t]his action is both unheard of and irresponsible and can only be seen as a deliberate act to collect money in bad faith with no basis of law." (Jt. Ex. 42.)

Neither "A" nor "H" had agreed to the subordination. (tr. 470, 582.) Indeed, "A" had no authority to agree to subordination. (Tr. 474, 574, 582.) Significantly, Francis sent in this strongly worded letter rather than submitting his new subordination proposal in writing as twice requested by "A". The obvious conclusion that can be drawn from this is that Francis was attempting to influence "A" and "H" by making false accusations that he knew were false. Interestingly, it had the opposite effect, as, on receiving the fax and not the written request, "A" and "H" concluded that "I"'s original denial still stood and that the case should be closed. (Jt. Ex. 45 at 19-21.) Therefore, I conclude that the Respondent violated sections 10.51(f) and (I) as charged.

Later Misrepresentations

Later in Month 1, Francis called the office of "G", the Area Director for the Area 2 District. He was put in touch with "K", Technical Analyst for the Area Director. (Tr. 521.) Francis called to complain that a lien subordination had been agreed to and the IRS was going to renege on it. (Tr. 521.) "K" told him she would have to look into the matter. (tr. 522.) She talked to "F", "I", "L" and "A". (Tr. 522-27.) "K" concluded that the subordination had never been approved and called Francis to so advise him. (Tr. 526-28.) She determined that Francis had made the claim to confuse the issue and that "it was not a good-faith understanding. I think he intended to cloud the whole subject to begin with. I think he was not truthful in the things that he told me." (Tr. 529.)

In another conversation, Francis maintained to "L" that "H" and "A" had agreed to a lien subordination. (Tr. 497.) She informed him that she was the only one who had the authority to approve a subordination and she had not. (Tr. 497.)

On Date 54, Francis called "A" and told him that he wanted to withdraw his CAP appeal of the subordination denial because the Taxpayer Advocate Office had upheld his position as to where the $ Amount 17 should go. (Jt. Ex. 45 at 33, Tr. 587.) The Taxpayer Advocate Office never notified "A" that they had approved the lien subordination. (Tr. 588.) There is no evidence in the record that the Taxpayer Advocate Office ever approved the subordination.

[14] The letter is apparently misdated as there is no doubt that "A" received it on Date 57.

Francis called "I" on Date 55. She told him that "K", 'M", Tech Support Manager, "L" and herself had all agreed that the subordination request would be denied. (Jt. Ex. 45 at 35, Tr. 420-21.) Francis threatened to file a complaint against everyone who had worked on the case and demand an explanation in writing why the request was being denied after it had been agreed to. (Jt. Ex. 45 at 35, Tr. 422.) "I" told him that nothing had ever been agreed to. (Jt. Ex. 45 at 35, Tr. 422.)

In apparent reaction to this telephone call, Francis "faxed" "I" a copy of the Date 52 letter he sent to "A" and a copy of the same letter, dated Date 56, which had three additional paragraphs added to it, evidently in response to "A"'s request that the new subordination request be submitted in writing. (Jt. Ex. 44, Tr. 422-23.) The fax cover sheet has four statements: (1) "These were the faxes sent to Mr. "A" and provided to Mr. "F";" (2) "Please look at the date of these faxes;" (3) "Is there any doubt that they made this offer?;" and (4) "Please also verify this with "H" as I had a specific conversation." (Jt. Ex. 44.)

All of these claims were knowingly false. Francis even admitted at the hearing that he did not have any direct conversations with "H" in which "H" agreed to the subordination; he asserted that he got the information from "A". (Tr. 1397.) The evidence is clear that when Francis did not get his way, he began making false assertions that the subordination had been agreed to in an attempt to bully the IRS officials into approving it. Consequently, I conclude that he violated sections 10.51(f) and (i), as charged.

Corp. 2

The Complaint alleges two violations of section 10.20(a), two violations of section 10.23 and one violation each of sections 10.22(a), 10.22(b)[15] and 10.51(b)[16]. (Comp. paras. 39-47, 55-82.) The violations came about because Francis did not provide information by Date 28 and 8, Date 39, as requested by Revenue Officer "D" on Date 11; did not provide information by Date 15, as requested by Revenue Officer "D" on Date 14; and failed to exercise due diligence and provided false and misleading statements in connection with a Date 17, corporate tax return.[17]

[15] Sections 10.22(a) and (b) (1994) provide that: "Each…enrolled agent…shall exercise due diligence: (a) In preparing or assisting in the preparation of, approving, and filing returns, documents, affidavits, and other papers relating to Internal Revenue Service matter; (b) In determining the correctness of oral or written representations made by him to the Department of the Treasury.

[16] Section 10.51(b) (1994) stated that an enrolled agent may be disbarred or suspended from practice before the IRS for disreputable conduct, including, but not limited to: "Giving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof… in connection, with any matter pending or likely to be pending before them, knowing such information to be false or misleading."

[17] Paragraphs 48-54 and 71 of the Complaint were withdrawn in the IRS' prehearing submission, filed on April 29, 2005.

The Date 11 Request

On Date 11, Revenue Officer "D"[18] called the Respondent to tell him what payments and documentation were needed for the IRS to consider Corp. 2's request for an installment agreement to pay off tax liabilities. (Jt. Ex. 7 at 1, Tr. 189.) She told him that she needed some information by Date 12, and the rest by Date 8. (Tr. 190.) He asked that she put the request in writing and that she have her group manager call him. (Jt. Ex. 7 at 1.) That same day, "D" sent him the request in writing on an IRS Form 9297 which listed the documents requested, whether they were to be submitted on Date 28 or Date 8 and concluded with the language: "I am required to advise you that failure to provide the above information by the date(s) required may result in enforcement action without further notice to you." (Jt. Ex. At 1-2, Ex. 8, Tr. 189-91.) "D"' group manager, "B", called Francis and told him that the information requested by "D" was still needed. (Jt. Ex. 7 at 2, Tr. 191, 360-61.)

The information requested by Date 28 was cashiers checks to replace dishonored checks and to pay the "bad check" penalty for 941 payments for Date Range 2, and either current Forms 940 and 941 (for the period ending Date 38) or a statement showing total wages paid, federal taxes withheld (income, Social Security, Medicare and federal unemployment) along with proof (bank receipts) of federal tax deposits made after Date 58. (Jt. Ex. 8.) The information to be provided by Date 8 was the "Income Expense Analysis" on Form 433-B (Collection Information Statement for Businesses); the profit and loss statement for Date 38; accounts receivable and accounts payable for the period ending Date 38; bank statements for Date 59, through Date 38; the current rent/lease agreement; and documentation regarding the sale of two machines. (Jt. Ex. 8.)

Francis did not provide the information by the requested dates. (Jt. Ex. 7 at 3-47, Tr. 191.) Nor did he request any extension of time to furnish the information or provide any explanation for his failure to furnish it. (Tr. 191, 361.)

The Respondent did not deny at the hearing that he failed to furnish the information. He claimed, however, that "[f]rom my understanding of what I'm required to provide, this isn't a proper and lawful request. An IDR [information document request] is an informal request. It's not a summons." (Tr. 1041.) The Respondent makes this same argument, without citation to any authority, in his brief, claiming that he is only obligated to respond to the IRS if a summons has been issued and a court order has been obtained enforcing the summons.[19] (Resp. Br. At 22.) Neither section 10.20(a) nor section 10.23 contain any language about summons or court orders, or formal or informal requests. If the sections were as restrictive as posited by the Respondent, either they would clearly state that or there would be precedent so interpreting them. It is easy to

[18] ''D" is a registered pseudonym with the IRS. (Tr. 186.)

[19] The Respondent does cite two "articles" in support of his position. One is the American Institute of Certified Public Accountants, "Comments of Proposed Modifications to Circular 230, April 2001" and the other is the July 26, 2002, Federal Register publication of the final regulations governing practice before the IRS. The discussions cited by the Respondent both have to do with furnishing privileged documents or responding to requests of doubtful legality. The Respondent has not claimed that any documents were privileged, nor has he asserted that the requests were of doubtful legality. Neither article says anything about the regulations governing practice before the IRS only applying in the case of a summons enforced by a court.

understand why the Respondent's interpretation is not the law; the system would be completely unworkable with such a requirement. I find that the Respondent's claim that he was not required by sections 10.20(a) and 10.23 to respond to "informal" request to be incorrect.

Francis also claimed that he told "D" that he was not going to respond to the request because he was not being paid by the taxpayer and that "I told her that I'm not going to be able to help on this issue, unless you're prepared to look at an installment agreement." (Tr. 1040-41.) This claim is unbelievable. In the first place, "D" testified that Francis never told her he was not going to provide the information because he had not been paid and the ICS history corroborated her. (Jt. Ex. 7 at 1, Tr. 192.) In the second place, the regulations contain no exception to providing information because the enrolled agent has not been paid.[20] In the third place, Francis' statement was conditional, "I will not provide the information unless you give my client an installment agreement," so even if true, it was not based on not being paid. Furthermore, if he was not planning to respond, why did he ask that the request be put in writing?

The Respondent was not credible on this issue. He clearly neglected or refused to promptly respond to "D"'s proper and lawful request of Date 11. His actions resulted in unreasonably delaying the collection of Corp. 2's' delinquent taxes. (Tr. 367-68/.) Accordingly, I conclude that he violated sections 10.20(a) and 10.23 as alleged.

The Date 14, Request

On Date 60, "D" returned a telephone call to Francis concerning Corp. 2. Among other things, he wanted to know what the IRS would need if the company were to sell some of its equipment. (Jt. Ex. 9, at Tr. 196.) She referred him to an IRS publication which explained how to apply for a certificate of discharge when property is sold by a company that has an IRS lien against it. (Jt. Ex. 9, Tr. 197.)

On Date 61, "D" received Corp. 2' Date 39 tax return. Attached to it was a form entitled "Sales of Business Property" which listed A# items as having been sold on Date 62, none of which had a sales price. (Jt. Ex. 17 at 1, Tr. 198.) She was concerned, as she had not received an application for a certificate of discharge from the company. (Jt. Ex. 17 at 1, Tr. 198.) Consequently, on Date 14, she "faxes" Francis a written request asking for the company's current financial information and an itemized list of the assets sold, the sales price, the circumstances regarding their sale, why no sales prices was listed and whether discharge had been applied for and received. (Jt. Ex. 16, 17 at 1-2, Tr. 208.) The information was needed because the collection case had been stalled and the financial information was over a year old. (Tr. 369.) The request originally had a due date of Date 70, but extensions were granted until the date became Date 15. (Tr. 209.)

The Respondent did not provide the information by Date 15. (Jt. Ex. 20 at 1, Tr. 209.) Nor did he request any further extension of time or provide any explanation as to why the information was not provided. (Tr. 210.) Indeed, on Date 72, "D"'s group manager, "B", again requested the information and gave Francis a due date of Date 73 and he failed to meet that deadline. (Jt. Ex. 20 at 4, Tr. 210-11.) The information was

[20] If Francis was not being paid, it would seem that his options were to respond to the request, withdraw as the designated power of attorney, or to tell "D" to deal directly with the taxpayer. (Tr. 214, 364.) Being obstructionist was certainly not an option.

never provided, resulting in delaying the IRS' determination of how to resolve the case and additional expense for the Respondent's client. (Tr. 211, 372.)

Francis had many excuses why he did not, or did not have to, furnish the information. None of them are credible. He again claimed that the told "D" that he was not being paid, testifying: "I told her wasn't able to assist her on this because I was behind on being paid, that at some point if they were willing to look at an offer in compromise, I would assist her anyway."[21] (Tr. 1048.) "D" testified that Francis never stated that he would not be responding because he was not being paid. (Tr. 1438.) Further, if he was not going to respond, why was he requesting and being granted extensions of time to respond? In addition, his trial testimony is inconsistent with his claim in his January 12, 2004, statement to the IRS, through counsel, that a complete response was provided by Date 73 and his statement in his Answer that all of the information was provided "on or before Date 15."[22] (Resp. Ex. F at 9, Answer at para. 59.)

Once more, Francis attempted to justify his lack of response by blaming the IRS for not accepting the conditions he claims he put on his cooperation. Firstly, "D" and Territory Manager "N" both testified that Francis did not attempt to condition responding to the request on it being part of an offer in compromise. (Tr. 1438, 1447, 1462-63.) Secondly, there is no provision in sections 10.20(a) (1994) or 10.23 (1994) for conditional responses. Thirdly, this testimony is inconsistent with all of the factors noted in the preceding paragraph.

Accordingly, I conclude that Francis neglected or refused to promptly respond to the Date 14 information request. The failure to provide the requested information unreasonable delayed the processing of the case. Thus, I conclude that the Respondent violated sections 10.20(a) and 10.23 as charged.

<u>The Date 17, Corporate Tax Return</u>

As noted above, on Date 14, "D" not only requested financial information concerning Corp. 2, she also requested an explanation of the claimed sale of assets on the Corp. 2 Date 39 tax return, dated Date 17, which she had received on Date 61. On Date 76, "D" returned a telephone call to Francis concerning the Date 14 request. With regard to the sale of assets, the Respondent told her that the company had lost its lease, had to move, and had just abandoned the assets listed as sold because it would cost more to move them than to replace them. (Jt. E. 17 at 2-3, Tr. 199.) When she told him that she needed an itemized list of assets sold, he said he could only give her a list of the assets the company still had. (Jt. Ex. 17 at 3, Tr. 199.)

On Date 77, "D" and her group manager, "B", went to Corp. 2's former business location. (Jt. Ex. 18 at 1-2, Tr. 200.) She spoke to the office manager and to the controller of the company that had acquired the building lease. They told her that Corp. 2 had moved out at the end of Date 39 and had not left behind any Miscellaneous Fixtures

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[21] Significantly, Francis was power of attorney for Corp. 2 from Date 75 through the conclusion of the trial. (Tr. 211, 1304.) Apparently, not being paid did not concern him enough to terminate their relationship.

[22] These two statements are, of course, inconsistent with each other.

#1, for which Corp. 2 had been paid approximately $ Amount 19. (Jt. Ex. 18 at 2-5, Tr. 200-02.)

"D" next discussed the matter with Francis in a Date 73 telephone call. (Tr. 203.) She told him he still had to provide the documentation and information requested regarding the assets left at the prior business location. (Jt. Ex. 21 at 2, Tr. 203.) He told her that all he could provide was a list of the assets the corporation had then, that he had not prepared all their returns in prior years, and that the assets "Could have been cannibalized, thrown out or traded over time." (Jt. Ex. 21 at 3, Tr. 203-04.) He went on to say that the company had not taken a listing of what was there, that no assets had been sold, and that no assets had been given away for payment or the satisfaction of any debts. (Jt. Ex. 21 at 3, Tr. 204.)

"D" had a second conversation with Respondent on Date 73 in which "B" also took part. Francis reiterated that he did not have a list of when and how the assets were disposed, claimed that the list on the tax return was of assets that were not at the new location and admitted that they were disposed of in many ways over a period of time (not on Date 62 as he had stated on the return). (Jt. Ex. 21 at 3, Tr. 204.) He said that he would be filing an amended return. (Jt. Ex. 21 at 4, Tr. 204.)

Yet again, the Respondent raised several inconsistent excuses for his conduct, but the one thing he never did was explain why he listed the assets as having been sold on Date 62, then told "D" on Date 76 that the property had been abandoned on Date 62, then changed his story and told her, on Date 73, that the assets could have been cannibalized, thrown out or traded over time, then later that same day conceded that the assets had been disposed in many ways, but not on Date 62. While he insisted at the hearing that he did not know how to list the assets that had been abandoned on a form which only had a provision for sales, he did not explain why he never told that to Revenue Officer "D" or why he had called her in Date 78 to ask about the sale of assets.[23]

This attempt to blame the IRS form for his problems was just the last of contradictory efforts to absolve himself of blame. In his January 16, 2003, letter to the IRS he asserted that he had been advised by other enrolled agents in his firm and other tax preparers "that the best thing to do was to show the assets as abandoned…" (Resp. Ex. Z at 19.) At the hearing, Francis testified that he was advised that there was no other way to show the assets except as "sold." (Tr. 1058, 1307.)

Francis also had conflicting explanations for his use of the Date 62, disposition date. In his January 16, 2003, submission to the IRS he claimed that Date 62 was "the date the taxpayer took physical inventory of these assets" at its new location. (Resp. Ex. Z at 19.) However, in his June 18, 2003, submission to the IRS, by counsel, the Respondent stated that he used the date he had performed a physical inventory of the equipment with Revenue Officer "D" as the disposition date of the assets. (Resp. Es. AA at 5-6.) Finally, at the hearing he testified: "For the date, we showed, we showed the date of the move…" (Tr. 1055-56.)

[23] Ironically, in his January 16, 2003, response to the IRS he maintained that: "The assumption that all assets were abandoned at the old location was made by the RO and not by statements made by me." (Resp. Ex. Z at 19.)

The Respondent's claim that, "[t]he 4794 form and the subschedules that go with that can't be changed. That's an IRS form. You can't change it to [assets] abandoned, exchanged, thrown out," flies in the face of logic. (Tr. 1058.) As Group manager "B" testified: "If I was preparing it, I would have [put] taken out of service, salvaged, something. I wouldn't have put a sold date if it wasn't sold. I've seen tax returns where the 1120 comparable returns – where it stated that it was taken out of service, salvaged, stolen, destroyed in fire, whatever the case may be." (Tr. 398.) Indeed, when Francis posed the question to the IRS on June 6, 2005, of how to handle an abandonment, the IRS responded; "Report an abandonment loss on Form 4797, part II, Ordinary Gains and Losses (Line 10.)" (IRS Ex. 9 at 1.)

Furthermore, even if it were accepted that Francis believed the way he reported the disposition was the only way to report it, that does not explain why he gave "D" a different, incorrect justification every time she asked him about it. I conclude that the Respondent made false statements to "D" when he submitted the tax return, during the telephone conversation on Date 76 and during the first telephone conversation on Date 73, knowing that they were false. Accordingly, he did not exercise due diligence in preparing the return or in determining the correctness of his representations to "D" and he knowingly gave false or misleading information to "D". Consequently, I conclude that he violated sections 10.22(a) and (b) as averred.

<u>Client(s) 1</u>

The Complaint sets out four violations of section 10.20(a), two violations of section 10.22(b) and four violations of section 10.23 in connection with the Respondent's representation of Client(s) 1. (Comp. paras. 83-112.) The violations transpired because in telephone conversations with Revenue Officer "E" prior to Date 79, and on Date 80, Francis told her that Client(s) 1 would pay off an offer in compromise with funds from his 401(k) account when, in fact, he could not, and because the Respondent failed to respond to information requested dated Date 18, Date 19, Date 20, and Date 21.

<u>The Offer in Compromise Funds</u>

Client(s) 1 owed several years back taxes, totaling more than $ Amount 20. (Tr. 80-81.) On behalf of Client(s) 1, the Respondent submitted an offer in compromise (OIC) application in the amount of $ Amount 22 to Office in Compromise Specialist "E" to pay off Client(s) 1's tax liability. (Tr. 81.) In the late afternoon of Date 24, "E" called Francis to tell him that according to Client(s) 1's financial statement he had no ability to make any payments. (Jt. Ex. 30 at 2.) In response, Francis told her that there were several errors in the statement and that the current value of Client(s) 1's 401(k) portfolio was $ Amount 21. (Jt. Ex. 30 at 2, Tr. 85.) "E" then told Francis that based on that amount, the minimum OIC that could be considered was $ Amount 24 (Jt. Ex. 30 at 2, Tr. 84-85.) She also told him that she needed verification of the 401(k) amount. (Jt. Ex. 30 at 2, Tr. 85-86.)

On Date 81, "E" called Francis to see if the Client(s) 1s would pay in full the joint liability of $ Amount 23 they owed, in addition to the offer on Client(s)' liability. (Jt. Ex. 30 at 2, Tr. 86.) In a return telephone call, Francis agreed to this proposal. (Jt. Ex. 30 at 2, Tr. 86.) As a result, "E" prepared an amended OIC application in the amount of $ Amount 24 for Client(s) 1's signature and sent it to Francis with another request for verification of the current balance of Client(s) 1's 401(k) fund. (Jt. Ex. 30 at 2, Tr. 87.)

Francis called “E” on Date 81 and requested additional time to get a current 401(k) statement. (Jt. Ex. 30 at 3.) “E” gave him until Date 82 to respond, telling him that failure to respond by that date would result in rejection of the offer. (Jt. Ex. 30 at 3.)

“E” received the signed, amended OIC application on Date 82 but did not receive the 401(k) verification. (Jt. Ex. 30 at 3, Tr. 87.) She called Francis to tell him that she had not received the verification, but he was not in, so she called Client(s) 1 and he told her that he had a statement that covered Date Range 3 and said that he would “fax” if to her. (Jt. Ex. 30 at 3, Tr. 88.) “E” never received the statement. (Tr. 88.) However, on Date 23, Francis “faxed” her a copy of a Date 23 internet print-out of a page on “Yahoo! Finance” showing the value of two stocks in Client(s) 1’s 401(k) portfolio along with a two page Date 84 – Date 16, statement from Investment House 1 of Client(s) 1’s account in the Corp. 3 Savings and Investment Plan. (Jt. Ex. 22.) The fax cover sheet said that the current value of the fund was $ Amount 25 [*sic*].” (Jt. Ex. 22 at 1.)

In telephone calls prior to Date 79, Francis told “E” that Client(s) 1 would withdraw funds from his 401(k) to pay the OIC and the Client(s) 1’s joint liability.[24] (Jt. Ex. 30 at 3, Tr. 91.) Consequently, “E” prepared the OIC application for acceptance. Acceptance approval was given by the acting group manager on Date 85, and the file was sent to the district counsel for approval that same day. (Jt. Ex. 30 at 5.) On Date 86, the district counsel called “E” and stated that he was approving the acceptance of the offer, but that the joint liability had to be paid in full before the acceptance letter could be sent to the taxpayer. (Jt. Ex 30 at 5.) “E”, in turn, called Francis on Date 87 to tell him that the payoff figure for the joint liability was $ Amount 26 through Date 88, that it had to be paid before the OIC acceptance letter would be sent, and that payment had to be by certified or cashier’s check. (jt. Ex. 30 at 5, Tr. 92-93.)

“E” received the OIC approval from the district counsel on Date 80. (Jt. Ex. 30 at 6, Tr. 94.) Since she had not received the payment for the joint liability by that date, “E” called Francis to find out why. He said that Client(s) 1 was trying to get the entire balance from his 401(k) all at once. (Jt. Ex. 30 at 6, Tr. 94-95.) She told him that she needed separate checks and gave him until Date 89 to respond.[25] (Jt. Ex. 30 at 6.)

Still not having received the payment, “E” called Francis again on Date 90 regarding payment of the joint liability and he stated that the taxpayer needed until Date 41 to make the payment. (Jt. Ex. 30 at 6, Tr. 96.) She told Francis that she would be working on Date 91, and if she had not received the payment by then she would return the OIC and send the case to collections for a possible levy on Client(s) 1’s 401(k) and wages. (Jt. Ex. 30 at 6.) Later on Date 69, she received a telephone message from Client(s) 1 inquiring about the status of the OIC. (Jt. Ex. 30 at 6, Tr. 97.) She spoke to

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[24] This finding is “prior to” rather than on Date 79, because the case history for Date 79 indicated that Francis and the Client(s) 1 had already agreed to withdraw the funds. (Jt. Ex. 30 at 3.) However, in his Answer, Francis admitted paragraph 104 of the Complaint which stated that: “In a telephone conversation on Date , with Internal Revenue Service employee Revenue Officer “E”, the Respondent asserted that his client, Client(s) 1, would withdraw the amount of the offer-in-compromise from his 401(k) account.” (Answer at para. 104.) Because of the discrepancy, paragraph 104 of the Complaint was amended, without objection, to state “In telephone conversation(s) prior to Date 79” so that it would conform to the evidence. (Tr. 1139-40.)

[25] At this point, “E” was also considering “bypassing” Francis. (Jt. Ex. 30 at 6, Tr. 95.) A “bypass” is when the IRS notifies the power of attorney and the taxpayer that they will only deal directly with the taxpayer. (Tr. 95.)

both Francis and Client(s) 1 on Date 92, told them the status of OIC, and restated what would happen if the joint liability payment was not received by Date 41. (Jt. Ex. 30 at 6, tr. 98.)

"E" received payment for the joint liability on Date 41 and gave the OIC acceptance to her group manager for final approval. (Jt. Ex. 30 at 6, Tr. 98.) Letters accepting the OIC were sent to Francis and Client(s) 1 on Date 22. (Jt. Ex. 30 at 7, Tr. 99.) However, on Date 112, Francis called "E" claiming that Client(s) 1 could not get the money from his 401(k) until he retired and inquiring if the offer could be reduced. (Jt. Ex. 30 at 7, Tr. 100.) Since Francis had consistently represented that the 401(k) fund would be the source of the payment, "E" was stunned by this statement. (Tr. 100-01.) "E" advised Francis that the case had been sent to the Area 3 Service Center as an accepted offer; that they now controlled the case and he would have to contact them. (Jt. Ex. 30 at 7, Tr. 100.)

Although "E" several times asked him for verification of the 401(k) funds, the Respondent never inquired beyond what his client told him about the accessibility of the funds, as he continually represented to the IRS that Client(s) 1's 401(k) funds were available to pay the OIC. Francis admitted in his Answer that he told "E" "that his client, Client(s) 1, would withdraw the amount of the offer-in-compromise from his 401(k)" in telephone conversations prior to Date 79, and that he told "E" in a telephone conversation on Date 80 "that his client, Client(s) 1, was attempting to get the entire balance due from his 401-K [*sic*] account to pay it off all at once." (Answer at paras. 104 and 105.)

Despite these admissions, Francis tried to avoid liability at the hearing by maintaining that "E" and Client(s) 1 arrived at the amount that could be withdrawn from his 401(k) without Francis' participation; that he did not have anything to do with the $ Amount 30 OIC, and that he did not find out about it until after Client(s) 1 had submitted it. (Tr. 1115-18, 1334, 1340-41.) Not only is this inexplicable assertion contrary to the admitted facts, but it is contrary to the rest of the evidence in the case.[26]

The assertion is contradicted by Revenue Officer "E"'s testimony and her contemporaneous noted made while the negotiations were going on. (Jt. Ex. 30, Tr. 84-101, 1436-37.) It is also contradicted by Francis' own witness, Client(s) 1, who testified that he had no recollection of telling "E" what he could assess from his 401(k) plan, but stated that he relied on Francis' expertise to handle all dealings with the IRS. (Tr. 946-48, 951-52.) It is further contradicted by the Respondent's statement in his January 16, 2003, submission to the IRS that "it was the belief of the taxpayer, the RO and myself that the monies in the retirement plan were accessible..." (Resp. Ex. Z at 25.) Finally, it is contradicted by his June 18, 2003, statement through counsel, that "the taxpayer was incorrect concerning the accessibility of the pension asset. This caused *Kevin* to prepare an Office in Compromise for an excessive amount." (Resp. Ex. AA at 6, emphasis added.)

Accordingly, I conclude that the Respondent did not exercise due diligence when he did not determine the correctness of his representations to "E", in telephone calls prior

[26] Section 10.64(c) provides that: "Every allegation in the complaint that is not denied in the answer is deemed admitted and will be considered proved; no further evidence in respect to such allegation need be adduced at a hearing."

to Date 79 , and in the Date 80, telephone call, that Client(s) 1 could get the money from his 401(k) account to pay the OIC. Thus, he violated section 10.22(b).

The Information Requests

Francis called “E” back on Date 18, and again asked if the amount of the OIC could be reduced. (Jt. Ex. 30 at 7, Tr. 101.) Again, she told him that the OIC had been accepted and was now a contract between Client(s) 1 and the IRS, that if he wanted to change the amount he would have to submit an “offer on an offer.” (Jt. Ex. 30 at 7-8, Tr. 101.)

Francis had “faxed” two documents to “E” requesting that the “offer be pulled back and recalculate it based on the reduced pension funds availability.” (Jt. Ex. 30 at 8, IRS Ex. 7 at 1.) One of the documents was addressed to Client(s) 1, dated Date 26, on the letterhead of Corp. 3 Benefits Center, and stated:

> As per your request, our office is providing a response in writing regarding your Retirement Value Plan. The Retirement Value Plan is [a] cash balance plan that operates similar to a defined contribution plan. The difference being that the employee does not contribute any money to the plan. The account balance is based upon an employees pensionable earnings, years of service and age. There are no plan loans, partial disbursements, in service withdrawals or financial hardship withdrawals available with this plan.

(IRS Ex. 7 at 2.) The other document is a fax dated Date 93, addressed to Client(s) 1 from “Employee 1,” concerning “Hardship Withdrawal” and states: “Please find enclosed Hardship Withdrawal paperwork. Your available total is $ Amount 27.” (IRS Ex. 7 at 3.)

“E” asked Francis about the difference in the two documents; he replied that they were one and the same and he could not explain the difference. (Jt. Ex. 30 at 8, Tr. 107.) She gave him the IRS manual reference for an “offer on an offer” (and later “faxed” him the pertinent section), told him that he would have to submit a current financial statement (Form 433-A), justification for the change, verification that Client(s) 1 could not get the funds for the current OIC from his 401(k), a copy of the 401(k) agreement, verification from Client(s) 1’s employer of the terms and conditions for withdrawal and whether this was the only retirement account Client(s) 1 had. (Jt. Ex. 30 at 8, Tr. 101-02, 107-08.)

That same day, in response, Francis “faxed” in a request “to compromise under a compromise contract” to pay $ Amount 28, “a gift from a family member,” to settle the tax balance due of $ Amount 29. (Jt. Ex. 30 at 8, Jt. Ex. 25.) “E” discussed the case with her group manager, who confirmed that the request was not adequate and that Francis had to follow the instructions outlined in the manual, including submitting a new 433-A. (Jt. Ex. 30 at 8, Tr. 106.)

“E” had another telephone conversation with Francis on Date 94 in which they discussed the problems with the offer he had sent over the previous day and she again “faxed” him a copy of the manual outline of a letter requesting an “offer on an offer.” (Jt. Ex. 30 at 9, Tr. 108.) She informed him that he had until Date 95 to submit the request. (Jt. Ex. 30 at 9, Tr. 108.)

On Date 96, the Respondent sent "E" a fax consisting of a cover sheet and four pages. (Jt. Ex. 27, Tr. 109.) The documents were a letter, signed by Francis, making an "offer on the offer" in the amount of $ Amount 31, a sheet showing that the amount of the offer was based on the $ Amount 32 which had been set out in the "Hardship Withdrawal" fax, and copies of the Corp. 3 Benefits Center letter and the "hardship Withdrawal" fax which has previously been submitted. (Jt. Ex. 27.) "E" rejected the offer because "I did not have verification of why we could not get the funds out of the 401(k). I did not have the 433-A and the computation on the second page was not appropriate." (Tr. 109.)

Francis did not submit another offer, the pension fund verification or a new Form 433-A by Date 95, so on Date 19, Offer in Compromise Specialist "O" called him at the request of "E", who had an accident on Date 97 and was out on extended leave. (Jt. Ex. 30 at 9, Tr. 109, 673.) She asked the Respondent where the updated Form 433-A and the 401(k) information was and he told her that he had sent everything to the IRS Commissioner. (Jt. Ex. 30 at 9, Tr. 673.) She had him "fax" her a copy of what he had sent to the Commissioner and it turned out to be the same letter that he had sent to "E" on Date 96. (Jt. Ex. 30 at 9.) "O" called Francis back, told him that the letter was not appropriate, that the district counsel would need the updated financial statement and other documents, but that "since you stated nothing has changed, I advise you to wait until Ms. "E" returns." (Jt. Ex. 30 at 9, Tr. 6767-77.)

"E" returned to work on Date 98, and was surprised to discover that the information still had not been provided. (Jt. Ex. 30 at 10, Tr. 111-12.) She called Francis on Date 20 and told him again what was needed to process the "offer on the offer." (Jt. Ex. 30 at 10, Tr. 113.) Francis offered no explanation for his failure to provide the documentation. (Tr. 113.) "E" followed up of the telephone call with a letter that same day which stated:

> Per our conversation today Date 20, please secure and provide the following information regarding Client(s) 1 [*sic*] offer reconsideration.
>
> - A copy of Corp. 3 "Pension Plan Contract" from the Plan Administrator. Need verification of information provided to the taxpayer by the employer regarding the plan.
>
> (We need a clear and documented explanation as to why the letter from employer dated Date 26 states there are no loans, partial disbursements, in service withdrawals or financial hardship withdrawals with the plan. Then, the second page attachment states, please find hardship withdrawal paperwork and gives a dollar amount. Please provide detailed explanation from the plan administrator.)
>
> - A statement from the employer verifying that the pension plan is the only plan Client(s) 1 has with the company, and there are no 401-K plan's [*sic*] to which he belongs.
>
> - Need a current financial statement with complete verification (Form 433-A attached.)
>
> I also need to note that an asset cannot be reduced for fees charge[d] to complete the offer. In your revised letter dated Date 96, you have reduced the value of

> available funds by $ Amount 33 which is not allowed. Once the true value of the plan has been determined, you need to add to that figure the equity in Client(s) 1s [*sic*] auto and any available cash on hand.
>
> Once the above information has been secured, please contact me at the telephone number shown above so we can attempt to resolve this matter. If you have any questions or need additional information, give me a call.

(Jt. Ex. 28, Jt. Ex. At 10, Tr. 113-14.) "E" "faxed" this letter to Francis and sent it by regular mail to Francis and Client(s) 1. (Jt. Ex. 30 at 10.)

After almost a month had passed and "E" had not received anything from the Respondent, she called him on Date 25. (Jt. Ex. 30 at 10, Tr. 114.) Francis claimed that due to the tax season he had not been able to contact Client(s) 1 to obtain the requested information. (Jt. Ex. 30 at 10, Tr. 114-15.) He said that he was going to call the taxpayer when he hung up and he would call "E" right back. (Jt. Ex. 30 at 10-11, Tr. 115.) Francis did not call back. (Jt. Ex. 30 at 11, Tr. 115.)

"E" discussed the case with her group manager on Date 99 and they decided that they would give Francis one more chance and if the information was not received, the accepted OIC would be defaulted. (Jt. Ex. 30 at 11, Tr. 115-16.) Accordingly, after talking to her group manager, "E" called Francis. (Jt. Ex. 30 at 11, Tr. 116.) He told her that he had spoken with Client(s) 1 and gotten the requested information. When "E" asked him about the 401(k) deductions shown on Client(s) 1's Date 100, pay stub, which she had received with the original OIC offer, he said that he needed to review the information and would call the next day with a valid explanation and have the request for consideration completed. (Jt. Ex. 30 at 11, Jt. E. 34 at 2, Tr. 116-17.) She told him that if the requested information was not received by Date 102, she would issue a default letter. (Jt. Ex. 30 at 12.)

The Respondent called in the late afternoon of Date 100. He said that he had spoken to Client(s) 1 who confirmed that he had a retirement pension plan, which could not be withdrawn from, as well as a 401(k) plan into which he made payments and from which he could make withdrawals. (Jt. Ex. 30 at 12, Tr. 119.) Francis told her that the taxpayer would provide him with the information and verification from the company as to what he could and could not get and he would review the information and call her on Date 102. (Jt. Ex. 30 at 12, Tr. 119.)

The Respondent called "E" in the late afternoon of Date 102, after she had gone for the day, and left a message. (Jt. Ex. 30 at 12, Tr. 119.) In the message, Francis said that he had received a call from Client(s) 1, who had called his pension plan company for verification and written statements concerning each plan and that the taxpayer expected to receive the information within seven to ten days. (Jt. Ex. 30 at 12, Tr. 119.) Francis did not offer any explanation of the discrepancy between this statement and his statement on Date 99 that he had *received* the information and needed to review it, or his statement on Date 100 that the taxpayer *would provide* him with the information, he would review it and call her on Date 102. (jt. Ex. 30 at 12, Tr. 120.)

On Date 103, "E" discussed the case with her group manager, who suggested that another letter be sent to Francis and Client(s) 1 informing them that if the information was not received within ten days, the OIC would be defaulted. (Jt. Ex. 30 at 13, Tr. 120.)

The letter was sent on Date 21 and informed them that if a proper request for an "offer on an offer," or the accepted amount of $ Amount 30, was not received within ten days of the date of the letter, the accepted offer would be defaulted. (Jt. Ex. 29, Jt. Ex. 30 at 13, Tr. 120-21.)

Francis did not respond by the close of business on Date 104. (Jt. Ex. 31 at 1, Tr. 121.) He did, however, leave a message at 3:46 p.m. on Date 105, stating that they still had not received the information from Corp. 3 and he hoped he could get some additional time to provide the information. (Jt. Ex. 31 at 1, Tr. 121.) "E" discussed the matter with her group manager on Date 106 and they decided that the Respondent had had over five months to provide the information and no further extensions would be granted. (Jt. Ex. 31 at 1, Tr. 122.) The default letter was sent that same day. (Jt. Ex. 31 at 2.) "E" never received anything further on this matter. (Tr. 122.)

The Respondent offered several rationalizations as to why he did nothing wrong in this instance. First, he asserted that he had no obligation to respond to "E"'s requests for information because the taxpayer was asking the IRS to do him a favor in requesting approval of an "offer on an offer" and the consequence of not providing the information was merely that the request would be rejected. (Resp. Br. At 37, Tr. 1142.) Superficially, this might appear to have some merit. After all, "E" told Francis he had until Date 95 to submit the "offer on an offer" request and, if he did not get it in, that matter was presumably finished. However, instead of telling "O", when she called him on Date 19, that they had not submitted an offer and did not intend to, he led her to believe that they still wanted to pursue the matter. He did the same thing when "E" called him on Date 20 and he continued to do so until the IRS finally got fed up and terminated the matter in Month 1. After leading the IRS on, he cannot now avoid liability by, in effect, blaming the IRS for not cutting him off earlier than it did.

Francis also maintained that it was not necessary to provide a new Form 433-A because the one in the file was still current. (Tr. 1121.) This ignores the requirement in the Internal Revenue Manual that when submitting an "offer of an offer," "[t]he taxpayer must submit a financial statement." (Jt. Ex. 26 at 2, Tr. 102, 185, 680.) It likewise disregards the fact that the "offer on an offer" would not be processed by the Offer in Compromise unit, but had to be considered by the district counsel, who did not have the file. (Tr. 162.) In addition, even if the Form 433-A in the file were still current, a statement to that effect, signed under penalty of perjury, rather than Francis' verbal assertion, was necessary. (Tr. 162.) Finally, in view of the problems arising after the original OIC was approved, it is not at all clear that the Form 433-A in the file was still current, and by Month 1, it was almost a year old.

Lastly, the Respondent relies on his "blame the taxpayer excuse," claiming that he told "E" that he had contacted the client several times to get the information and told her that she could contact the client directly if she wanted to. (Tr. 1121.) This is interesting in view of the fact that he tried to blame the problems on the original OIC on "E" directly contacting the client. Furthermore, there is no evidence that Francis had even contacted Client(s) 1 about the problem until after Date 25.

The evidence is overwhelming that the Respondent unreasonably delayed the prompt disposition of this matter. The original OIC was not defaulted until Date 106, although, but for Francis stringing the IRS along, it would have automatically defaulted at the end of Date 107.[27] Moreover, the Client(s) 1 file was not returned to collection status while Francis appeared to be pursuing the "offer on an offer." (Tr. 1431-32.) Finally, if nothing else, the Respondent wasted the time and energy of the Offer in Compromise unit.

I conclude as well that the Respondent, at best, neglected and, at worst, refused to promptly submit information in the "offer on an offer" matter before the IRS on the proper and lawful request of Offer in Compromise Specialist "E." By appearing to be pursuing the matter, he obligated himself to provide the information.

Client(s) 2

The Complaint alleges one violation each of sections 10.20(a), 10.23 and 10.51(i) in connection with the Respondent's representation of Client(s) 2. (Comp. paras 113-117.) The violations took place during a Date 108, telephone conversation between Francis and Group Manager "P" in which he refused to provide requested information in a contemptuous manner.[28]

Revenue Agent "Q" was assigned to audit the Client(s) 2 tax return in Date 113. (Tr. 64, 71.) On Date 36, she called Client(s) 2 to set up an appointment with them. Client(s) 2 said that her husband would have to call back about the appointment and that she could only meet with "Q" for a very limited time because she had to take care of four children. (IRS Ex. 1 at 2.) She said that she only had bank statements and invoices, that their power of attorney, Kevin Francis, had the financial statement and general ledger, but refused to give it to them because they still owed him money. (IRS Ex. 1 at 2, 66-67.)

Francis called "Q" later that day after having been called by Client(s) 2. He told "Q" that she could either delay the case for a few months until Client(s) 2 paid him, at which point he would provide the financial statement and the general ledger, or she could proceed with the examination by going through the five boxes of invoices and bank statements that the taxpayers did have, to get the audit done. (IRS Ex. 1 at 2-3, Tr. 67.) He went on to say that if she did that and any adjustments were made, he would appeal the case just for fun as a free service to the taxpayers. (IRS Ex. 1 at 3, Tr. 67.) "Q" told Francis that she did not have the authority to delay the case for a few months and would ask her manager to contact him. (IRS Ex. 1 at 3, Tr. 67.)

Because she did not have the authority to delay the audit and because of Francis' statement about appealing the case just for fun, "Q" discussed the case with manager, "P". (IRS Ex. 1 at 3, Tr. 68.) As a result, "P" called Francis on Date 108. (Jt. Ex. 4, Tr. 32.) Francis told "P" that "Q" was welcome to have an appointment at Client(s) 2's house to review the bank statements and source documents, but that the husband was seldom there and Francis would instruct the wife not to answer any questions from the agent unless the questions were submitted in writing to Francis first, in which case he would provide the answers to the wife before the appointment. (Jt. Ex. 4, Tr. 35-36.)

"P" told him that they would not provide the questions beforehand. (Jt. Ex. 4, Tr. 35.) She told him that they needed the general ledger to audit the tax return and he

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[27] Once the OIC was accepted, the taxpayer had 90 days to pay it. (Tr. 101.)

[28] Paragraphs 118-120 of the Complaint were withdrawn in the IRS' prehearing submission, filed on April 29, 2005.

responded that he had the ledger on his computer, but would not produce it since he had not been paid, stating, “I will destroy the records before I give them to you if I have not been paid for them.” (jt. Ex. 4, Tr. 36.) “P” was shocked by this statement and asked Francis to repeat it, which he did. (Jt. Ex. 4, Tr. 36.) He also said that he would withdraw as power of attorney so he would not be required to provide any records and if they audited the taxpayer anyway he would sign on again as power of attorney to handle the appeal. (Jt. Ex. 4, Tr. 36.)

The Respondent never provided the general ledger while “Q” was performing the audit. (Tr. 68.) The general ledger is normally one of the first things requested as part of an audit. (Tr. 40.) It allows the agent to identify what source documents support the entries on the tax return. (Tr. 36.) Francis’ refusal to provide the general ledger caused a relatively simple case, that would easily have taken 15 to 20 hours to complete, take 80 hours. (Tr. 41.)

Francis did not deny refusing to provide the general ledger to both “Q” and “P” or stating that he would rather throw the ledger away than provide it if he had not been paid for it. (Tr. 1150-53.) He professed not to recall whether he had power of attorney for the Client(s) 2s on file at the time. (Tr. 1147, 1148.) He offered as evidence that he had not been contemptuous the fact that “P” continued to talk to him after he made the statement. (Tr. 1157-58.)

Francis makes several arguments concerning these charges. First, he asserts that OPR has no jurisdiction over his actions in this matter because he was not acting as the taxpayer’s representative in this case. Second, he claims that he did not have to provide the information because he believed the request to be of questionable legality. Next, he proffers that “P”’s testimony is biased and not credible. Finally, he argues that there is no allegation of delay in the Complaint. (Resp. Br. At 41-45.) None of these arguments are persuasive.[29]

Turning to the first proposition, Francis asserts that he was representing his company’s interests in this matter, not the taxpayer’s, and therefore the rules of practice do not apply. In fact, Client(s) 2 filed a Declaration of Representative listing Francis as their power of attorney for all personal tax matters for the period Date 109 through Date 38, co-signed by Francis, on Date 110. (Jt. Ex. 58.) There is no record of him ever withdrawing. Further, in the conversation with “P” about the general ledger, he told “P” that he would instruct the wife not to answer questions, unless the questions were submitted first to him in writing and then he would tell her what to answer, which obviously indicated that he was representing the taxpayer. Then, after he said that he would not provide the general ledger, he said that he would withdraw as power of attorney and then he would not be required to provide any records, further indicating that he was representing the taxpayer. Indeed, the one thing he did not say to “P” was he was not representing the taxpayer in refusing to provide the general ledger. He clearly was representing the taxpayer and his statement about withdrawing in the future evidences that he has the same understanding. Thus, he is plainly subject to OPR jurisdiction on this issue.

[29] The two other arguments made by Francis on these charged are not worthy of discussion.

The next argument, that Francis believed the request was of questionable legality, is also without merit. He claims that this position is justified by section 10.28, 31 C.F.R. §10.28 (2002), and State 1 law. Manifestly, section 10.28 was not in existence on Date 38. Furthermore, it deals with the return of a *client's* records to the client. While it does state that if state law permits retention of a client's records in a fee dispute, the practitioner need only return to the client those records that must be attached to his return, it has nothing to do with a practitioner turning records over to the IRS.

Next, Francis asserts that "P" had a clear animus against Francis and, therefore, none of her testimony is credible. It did appear that "P" did not like Francis. The problem, however, with this argument is that Francis does not dispute any of her testimony. Indeed, he corroborated it. So, while I find "P"'s testimony to be credible, as it was corroborated by contemporaneous written statement as well as by "Q"'s contemporaneous statement, "Q"'s testimony and Francis' testimony, it does not make any difference whether it is credible or not since what she testified to is agreed upon.

Finally, it is hard to understand Francis' claim that the Complaint made no allegation of delay. Section VI.A.116 plainly stated that: "The actions referenced in paragraph 114 [refusing to provide the ledger constitute misconduct under C.F.R. §§ 10.20 (1994) (neglecting or refusing to promptly submit records or information) and 10.23 (1994) (unreasonably delaying the prompt disposition of any matter before the IRS.)" Thus, delay is clearly alleged.

I conclude that Francis unreasonably delayed the prompt disposition of the audit. He even suggested that the audit be delayed for several months until he was paid. Furthermore, he clearly refused to promptly submit the general ledger on the proper and lawful requests of both "Q" and "P". Whether his statement that he would rather destroy the records before he gave them to the IRS if he had not been paid for them constituted contemptuous conduct, however, is a closer question.

Surprisingly, Francis made no argument in his brief that the statement was not contemptuous. His course of conduct with "Q" and "P," as was his conduct with most of the IRS employees in this case, was contemptuous. Nonetheless, it cannot be said that the statement contained abusive language, made false accusations and statements knowing them to be false or circulated or published malicious or libelous matter. On the other hand, section 10.51(i) begins by prohibiting "[c]ontemptuous conduct in connection with practice before the Internal Revenue Service" and the listed prohibitions are examples of contemptuous conduct, not an exclusive listing. "Contemptuous" is defined as: "1 "manifesting, feeling, or expressing contempt or disdain." *Webster's Third New International Dictionary* 491 (1993.) While the words themselves might not be contemptuous, when considered in the context of his dealing with "P," Francis certainly manifested and expressed contempt and disdain toward her and the IRS. Accordingly, I conclude that he violated section 10.51(i) as alleged.

Conclusion

Throughout these proceedings, the Respondent has attempted to place blame everywhere but on himself. He has argued that the IRS is out to get him. There is no evidence that any IRS employee did anything untoward in processing these charges, that any charged were fabricated, or that the Respondent was enticed into violating the regulations. He has argued that the charges were not timely filed. There is no evidence of unreasonable delay; in fact, it appears that most of the delay resulted because the IRS gave him every opportunity to address the charges before the Complaint was ever filed.

He has also argued on various allegations that the taxpayers did not provide him the necessary information, that he had no responsibility to "rat" on his client by telling the IRS that the taxpayer had not provided the information, that the IRS should have dealt directly with the taxpayer, that the IRS acted improperly in dealing directly with the taxpayer, that he had no obligation to respond because failure to respond simply redounded to the detriment of his client and that no practitioner can be held liable for an occasional late response. None of these arguments was persuasive.

Significantly, most of his arguments were not directed at the issues alleged in the charges, but rather attempted to direct attention away from the allegations and away from the Respondent's action, or lack of actions. Finally, as has been noted, the Respondent was not a credible witness. On the other hand, almost every element of the IRS case was supported by credible testimony and corroborated by the contemporaneous case history entries as well as other documentary evidence. Accordingly, I conclude that the Respondent violated each of the provisions of the regulations set out in the Complaint.

Penalty

OPR has requested that Kevin Francis be suspended from practice before the IRS for a period of two and one-half years. The regulations provide that the judge's decision must include "an order of censure, suspension, disbarment, disqualification, or dismissal or the complaint," but do not provide any standards for determining the sanction. 31 C.F.R. § 10.76(a). Nonetheless, it must be kept in mind that the purpose of disciplinary proceedings under these regulations is not to punish the Respondent, but to protect the public and those who would rely on him for advice and service, and to maintain the integrity of practitioners before the IRS. *See Sicignano v. United States*, 127 F. Supp.2d 325, 332 (D. Conn. 2001) ("[T]he Treasury Department's rules and regulations governing practice before the IRS are aimed at protecting the integrity of a tax system that depends on voluntary compliance."); In *Re Weinstein*, 459 P.2d 548, 549. (Or. 1969), *cert. denied*, 398 U.S. 903 (1970) ("[T]he primary purpose of professional discipline proceedings is to protect the public. The punishment of an offending member of the profession is indeed a serious matter, but it is incidental to the protection of the public.") Thus, a penalty must be adjudged with this purpose in mind.

In this case, the Respondent had exhibited a depressing pattern of operation contrary to Circular 230's focus on ensuring a system where practitioners conduct themselves in a professional manner in dealing with the IRS. He has argued that he should not be sanctioned for an occasional late, or lack of, response. The problem, however, is that the instances of failure to provide information were not occasional. In every case there were multiple instances, a course of conduct that resulted at the very least in delay in the resolution of the case, not to mention the waste of the IRS employees' time and efforts. His excuses only make matters worse. Threatening not to furnish information in an attempt to force the IRS to allow the taxpayer to enter into an installment agreement or have an offer in compromise accepted, as he did in Corp. 2, or to delay an audit for several months, as he did in Client(s) 2, evidences, at worst, arrogance and disdain, or, at best, a complete lack of understanding of how the system is supposed to work.

Similarly, making false statements to influence an IRS employee to take a favorable action on behalf of one's client are particularly egregious violations of both the rule and the spirit of the rules of practice. Nor does it appear that these were isolated instances. "K", Technical Analyst for the Area Director, testified that she received telephone calls from the Respondent at least once a week and that:

> I would say to you that he always seemed to try to confuse the conversation. He could say something to me, and I could say something back. And then we'd go on and continue to talk about whatever the case was we were talking about. He would repeat what I said, but he wouldn't repeat what I said. He'd say, "You said this." I'd say, "Wait a minute. That's not what I said. What I said is this." The conversations always went like that. It seemed to - like, I'd have to stop I don't know how many times during the conversation to clarify and explain again. "That's not what I said." That's how our conversations went. They were very circular, and it was as if he was clouding things all the time. We couldn't really get to the point.

(Tr. 529-30.)

The Respondent has not offered any evidence in the extenuation or mitigation of these violations. He has not asserted that his actions were neither deliberate nor intentional. His whole demeanor and attitude during his testimony implied that these violations were either a figment of the IRS' imagination, the result of the IRS failing to accede to his demands, or the fault of someone other than himself. Under the circumstances, I find that a two and one-half year suspension is an appropriate sanction for his conduct.

Order

Based on the foregoing, it is ORDERED that counts 1 through 47, 55 through 70 and 72 through 117 are AFFIRMED and that the Respondent, Kevin Francis, be SUSPENDED from practice before the IRS for a period of TWO AND ONE-HALF YEARS, commencing on the day this decision becomes final.[30]

T. Todd Hodgdon
Administrative Law Judge.

[30] In the absence of an appeal to the Secretary of the Treasury, for review of the decision on motion of the Secretary, this decision will become the final decision of the agency 30 days after the date of its issuance. 31 C.F.R. § 10.76(b). Any appeal must be filed within 30 days of the date of this decision, must be filed with the Director of Practice in duplicate, and must include exceptions to the decision and supporting reasons for such exceptions. 31 C.F.R. §10.77.